United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/affidavit

75-4068

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4068

B
P/S

YOUSSEF ALI DIB,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
Special Assistant United States Attorney,
Of Counsel.

2

TABLE OF CONTENTS

TABLE OF CASES

ISSUES PRESENTED

1. Whether the order of the Board of Immigration Appeals denying the petitioner's motion to reopen hi deportation proceedings was an abuse of discretion.

2. Whether the order of the Board of Appeals denying petitioner's application for adjustment of status pursuant to Section 245 of the Act was erroneous because it allegedly failed to make a finding as to petitioner's eligibility for such adjustment of status before denying the application in the exercise of discretion.

STATEMENT OF THE CASE

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a(a), Youssef Ali Dib ("Dib") petitions this Court for review of orders of deportation entered by the Board of Immigration Appeals (the "Board") on December 9,

1974 and April 8, 1975. The former order dismissed Dib's appeal from an order of an Immigration Judge which denied Dib's application for adjustment of status under Section 245 of the Act, 8 U.S.C. §1255 as a matter of administrative discretion. The April 8th order denied Dib's application for a stay of deportation pending the Board's decision in Dib's motion to reopen his deportation proceedings so that he might reapply for an adjustment of his status under Section 245 of the Act. The Board denied the motion to reopen in an order dated April 9, 1975.

Petitioner contends that the Board's order of April 9, 1975 should be set aside because the Board erred in alleged material changes in the petitioner's circumstances with respect to his re-marriage to a United States citizen and the issuance of a new labor certification This petition to review was filed on April 8, 1975 The petition was dismissed by order of the Clerk on February 17, 1976 on account of petitioner's failure to file his brief in accordance with the

scheduling order of this Court. However, the petitioner moved to reinstate his petition and by order dated March 12, 1976 the Court reinstated the petition and issued a new scheduling order. Since the date of filing this petition the alien has enjoyed the statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act.

STATEMENT OF THE FACTS

The petitioner, Youssef Ali Dib, is a 27 year old alien, a native and citizen of Lebanon. He last entered the United States on July 1, 1972 at which time he was admitted as a nonimmigrant employee of the Kuwait Mission to the United Nations and was authorized to remain in the United States in that status until July 1, 1973. His employment with the Kuwait Mission terminated on December 1, 1972 and he has continued to reside in the United States since that time without authority.

On December 7, 1972 Dib married Kathleen McNulty, a United States citizen. On December 15, 1972 the Immigration and Naturalization Service (the "Service") instituted deportation proceedings against Dib by the issuance of an order to show cause and notice of hearing (T. 24).* At a deportation hearing held on April 4, 1973 Dib, through his attorney, conceded deportability, applied for an adjustment of his status to that of a permanent resident alien and also applied for the discretionary relief of voluntary departure in lieu of deportation

At the outset of the deportation hearings, which covered a period of nine months, Dib sought to adjust his status on the basis of his marriage to a United States citizen. However, the record reflects that Dib's marriage to Kathleen McNulty was probably entered into by Dib solely to obtain an immigration

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*References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record previously filed with the Court.

benefit and that such fact became obvious to Dib's wife almost immediately after her marriage to Dib. Consequently, Mrs. Dib withdrew a visa petition filed on behalf of her husband almost immediately after filing it. Although she testified during the deportation proceedings and filed a second visa petition on her husband's behalf during the course of the proceedings, Mrs. Dib again withdrew her visa petition on behalf of Dib and informed the Service that she intended to divorce Dib (T. 28).

When it became apparent to Dib that he would be unable to adjust his status on the basis of his marriage, he then secured a labor certification as required by Section 212(a)(14) of the Act, 8 U.S.C. §1182(a)(14). In support of his application for the labor certification, Dib stated that he was employed as a specialty chef at a New York restaurant and also listed various employments outside the United States to establish his experience as a specialty cook. During the course of the deportation proceedings both Dib and

his employer testified with respect to Dib's duties as a specialty cook and Dib testified with respect to his prior employment in Kuwait. Evidence was also introduced in the form of a report from the United States consul in Kuwait which indicated that, at the very least, Dib had been somewhat less than candid with respect to his prior experience in Kuwait.

At the conclusion of the deportation hearings, the Immigration Judge found that, even if it be assumed that Dib be statutorily eligible for adjustment of status, as a matter of administrative discretion the privilege should not be granted to him in view of the circumstances in the case, particularly the circumstances surrounding the termination of his employment by the Kuwait Mission and the apparent "sham" marriage entered into by Dib in order to obtain an immigration benefit In a decision and order dated May 24, 1974 the Immigration Judge found Dib deportable as charged, denied his application for adjustment of status in the exercise of

discretion and granted Dib the privilege of voluntary departure in lieu of deportation. He also entered an alternate order of deportation to Lebanon in the event that Dib failed to depart voluntarily within the prescribed time (T. 22).

Dib appealed the order of the Immigration Judge to the Board of Immigration Appeals and in a decision dated December 9, 1974 the Board affirmed the order of the Immigration Judge and dismissed Dib's appeal (T. 20). Pursuant to the Board's order granting Dib a sixty-day voluntary departure period, the Service advised Dib by letter dated December 16, 1974 that he was required to effect his voluntary departure by February 9, 1975 (T. 19).

On February 7, 1975 Dib submitted a motion to reopen his deportation proceedings for the purpose of allowing him to apply for the privilege of adjustment of status under the provisions of Section 245 of the Act. The new evidence presented in the motion papers

consisted of the issuance of a new labor certification to Dib (T. 17). The Service filed a brief in opposition to the motion to reopen but service of the brief was erroneously made on Dib's former counsel on March 5, 1975 (T. 16). The record reflects that Dib's present attorney learned of the Service's brief in opposition sometime in late March 1975 and by letter dated March 28, 1975 the attorney advised the Board of the Service's error in serving the brief and also advised the Board of Dib's divorce from Kathleen McNulty on January 31, 1975 and his remarriage on February 5, 1975 to Beverly Jean Uncapher, a United States citizen (T. 13).

By order dated April 1, 1975 the Board denied Dib's application for a stay of deportation pending an adjudication of his motion to reopen the deportation proceedings (T 12) In a further order dated April 3, 1975 the Board denied the motion to reopen (T 11) On April 8, 1975 Dib's attorney telephonically advised the Board that he had mailed supplementary material to the Board on April 3, 1975 (T 3) and again

requested a stay of deportation, which was denied by the Board in an order dated April 8, 1975 (T 10) In a final order dated April 9, 1975 (T 2) the Board, after acting on its own motion to consider the supplementary material submitted, affirmed its prior denial of the motion to reopen for the reasons set forth in the Board's decision of April 3, 1975

This petition for review was filed on April 8, 1975 to review the Board's orders of December 9, 1974 and April 8, 1975 (T 1) Pursuant to a scheduling order of the Court dated December 4, 1975 the Service filed the certified administrative record on December 17, 1975 The scheduling order provided that petitioner's brief was to be filed on or before January 19, 1976 However, petitioner neither failed to file his brief by that date nor did he request an extension of time for filing his brief Consequently, by order dated February 17, 1976 the Clerk dismissed the petition on account of petitioner's default. By notice of motion filed March 4, 1976 petitioner moved to

reinstate his petition for review and the motion was granted by order of the Court dated March 12, 1976 Petitioner's deportation has been stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(13).

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat 163 (1952), as amended:

> Section 245, 8 U.S.C. 1255
>
> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General in his discretion, and under such conditions as he may prescribe to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

* * *

RELEVANT REGULATION

Title 8, Code of Federal Regulations (CFR):

§3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board . . . shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . .

* * *

§3.8 Motion to reopen or motion to reconsider.

(a) Form. * * * Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

* * *

ARGUMENT

POINT I.

The Board of Immigration Appeals did not abuse its discretionary authority in declining to reopen the deportation proceedings to permit the alien to reapply for adjustment of status pursuant to Section 245 of the Act.

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,* has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. 3.2, provides in pertinent part that motions to reopen shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the prior hearing. Additionally, 8 C.F.R. 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material."

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* Section 103(a) of the Act, 8 U.S.C. §1103(a).

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought Accordingly, the Board is required to evaluate any such offer of evidence agqinst the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence he offered in support of his motion.

B. Adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. §1255.

Section 245 of the Act, 8 U.S.C. §1255, provides that the Attorney General, in his discretion, may adjust the status of an alien to that of a permanent resident alien provided the alien is eligible to receive a visa, is admissible to the United States and provided an immigrant visa is immediately available. Because this relief circum-

vents the usual immigration procedures, it is considered extraordinary and will be granted only in meritorious cases. Ameeriar v. Immigration and Naturalization Service, 438 F.2d 1028 (3d Cir. 1971), cert. denied, 404 U.S. 801 (1972); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968).

In order for an alien to be eligible for consideration, the alien has the burden of establishing that he is both statutorily eligible for this relief and that his application merits the favorable exercise of discretion. Santos v. Immigration and Naturalization Service, 335 F 2d 262 (9th Cir. 1967). Of course, if the alien fails to meet the statutory requirements, he will be ineligible for the relief sought and hence the exercise of discretion will never be reached. Diric v. Immigration and Naturalization Service, 400 F.2d 658 (9th Cir. 1968), cert. denied, 394 U.S. 1015 (1969); Gambino v. Immigration and Naturalization Service, 419 F 2d 1355 (2d Cir.), cert. denied, 399 U.S. 905 (1970).

Having examined the nature of the relief sought herein, we now turn to consider the evidence contained in the administrative record upon which the Board's decision was based.

C. The evidence offered in support of the motion to reopen did not warrant reopening.

In support of his motion to reopen, the petitioner submitted a labor certification issued to him by the Department of Labor subsequent to entry of the final order of deportation. Since an applicant for adjustment of status must establish his eligibility for an immigrant visa, the applicant must either obtain a valid labor certification from the Department of Labor or must establish that he is exempt from such certification. Section 212(a)(14) of the Act, 8 U.S.C. §1182(a)(14).

There was, however, no offer of proof of facts to show that Dib merited the favorable exercise of discretion, nor were there any equities toward this end contained in the record of proceedings already before the Board. To the contrary, the record indicated the possibility that Dib had knowingly and intentionally obtained a prior labor certification by submitting false information to the Department of Labor. Furthermore, when questioned under oath by the Immigration Judge with respect to work experience shown on the application for the prior labor certification, Dib's testimony was equivocal and apparently lacking in candor. After submitting his motion to reopen petitioner supplemented the motion by providing evidence of his divorce

and remarriage to a United States citizen. However, the record also established that the petitioner's prior marriage to a United States citizen was probably entered into for the sole purpose of obtaining an immigration benefit. The Board took note of these facts and determined that the petitioner had failed to establish a meritorious case for reopening.

We submit that the Board's decision was well-grounded. The petitioner apparently contends that since he offered evidence to establish statutory eligibility, i.e., the second labor certification and his marriage to a United States citizen, the Board was required to reopen the deportation proceeding. He argues that the Board's refusal to grant him a full hearing on his application was an abuse of discretion.

We submit that the Board's decision is well-supported by the record, which is virtually barren of any equity in favor of the petitioner. From an examination of the entire record, including the petitioner's sworn testimony, it is apparent that he attempted to secure, and in fact did

secure, a labor certification by fraud and that he entered into a marriage with a United States citizen with an apparent view to adjusting his status on the basis of the marriage. In passing on cases within its jurisdiction, the Board is expressly authorized to exercise any of the Attorney General's authority and discretion appropriate and necessary to the disposition of a case. 8 C.F.R. §3.1(d). It has long been the practice of the Board to make its own determination on questions of both law and fact and on whether discretionary relief should be granted. Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 278 n.2 (1966). In the present case, involving a motion to reopen, there is an additional express grant of power to the Board in 8 C.F.R. 3.2 which requires the evaluation of proferred evidence before such motion can be granted.

D. Scope of review.

The primary issue before this Court is whether the Board abused its discretionary authority by declining to reopen the deportation proceedings in order to reconsider the alien's application for adjustment of status to that of a permanent resident alien. It is, of course, well settled that the grant or denial of a motion to reopen is a matter

vested within the sound discretion of the Board. Novinc v. Immigration and Naturalization Service, 371 F.2d 272 (2d Cir. 1967). Furthermore, the scope of review by this Court is extremely narrow, Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969), and the Board's decision should not be overturned unless there has been a clear abuse of discretion. Schieber v. Immigration and Naturalization Service, 461 F.2d 1078 (2d Cir. 1972); La Franca v. Immigration and Naturalization Service, 413 F.2d 686 (2d Cir. 1968). Where, as here, the evidence offered would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S . 1003 (1968).

POINT II.

THE ISSUE RAISED BY THE PETITIONER WITH RESPECT TO THE BOARD'S FAILURE TO MAKE A FINDING WITH RESPECT TO HIS STATUTORY ELIGIBILITY FOR ADJUSTMENT OF STATUS IS NOT PROPERLY BEFORE THIS COURT

Petitioner contendsthat the Board erred in its decision of December 9, 1974 in failing to rule on his statutory eligibility for adjustment of status before exercising its disctetion with respect to his application. Whatever the merits of Maignan's contention may be, the

issue raised by him is not properly before this Court. The record clearly establishes that the issue now raised by the petitioner was never raised before the Board.

Many cases support the proposition, as stated by the Supreme Court, that

> "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and and state the reasons for its actions." Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 155 (1946).

Likewise, in United States v. L.A. Tucker Truck Lines, 344 U.S. 33 (1952), the Supreme Court held that its "general rule" should be applied:

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that the courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." Id. at 37

The reasoning behind this rule was well-expressed by the Court in D.C. Transit System Inc. v. Washington Metropolitan Area, 466 F 2d 394 (D.C.Cir.), cert. denied, 409 U.S. 1086 (1972), when it stated:

> ". . . contentions to be urged on appellate review of judicial proceedings must be properly

raised and preserved in the trial court. Not the least of those considerations is the opportunity, through precise identification of the errors alleged, for administrative reexamination and correction prior to judicial intervention in the regulatory process. We have long admonished that points not subjected to agency scrutiny during administrative proceedings will not normally be entertained on judicial review." Id. at 414.

It is submitted, therefore, that petitioner's failure to raise the issue presented on this petition for review with respect to the Board's failure to rule on his statutory eligibility for adjustment of status to the Board for its consideration, or to seek reconsideration of the Board's decision, precludes this Court from considering the issue.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

Robert B. Fiske, Jr.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

Mary P. Maguire,
Special Assistant United States Attorney,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 75-4068

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

21st day of April, 1976 s he served a copy of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

James J. Orlow, Esquire
233 Broadway
New York, New York 10007

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

21st day of April, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977